

STATE OF IOWA
DEPARTMENT OF COMMERCE
UTILITIES BOARD

IN RE: IMPLEMENTATION OF THE FEDERAL COMMUNICATIONS COMMISSION'S TRIENNIAL REVIEW ORDER ADOPTING NEW RULES FOR NETWORK UNBUNDLING OBLIGATIONS	DOCKET NO. INU-03-1
--	---------------------

ORDER CLOSING 90-DAY PROCEEDINGS AND GRANTING MOTION

(Issued December 29, 2003)

In an open meeting on February 20, 2003, the Federal Communications Commission (FCC) adopted rules concerning the obligations of incumbent local exchange carriers (ILECs) to make elements of their networks available on an unbundled basis. Although the FCC's written order memorializing its decisions was not released until a later date, key findings were announced in a press release on February 20, 2003. Among other matters, the FCC made a presumptive finding that local circuit switching for business customers served by high-capacity loops will no longer be required to be made available as an unbundled network element (UNE). The FCC described this as the "enterprise market" and found that competition in these enterprise markets would not be impaired if the local switching UNE were unavailable. The treatment was further detailed at ¶¶ 451 through 458 of the FCC's

written order, which was released on August 21, 2003, and published in the Federal Register on September 2, 2003, to be effective on October 3, 2003.¹

The FCC provided that a state commission would have 90 days from the effective date of its order to rebut the presumption of "no impairment" as it affects enterprise switching in an individual state. After the FCC's meeting, and based on the FCC's press release, the Utilities Board (Board) opened this docket and sought comments on procedural matters in advance of the release of the text of the FCC's decision. Those interested parties that filed comments all indicated that the Board should not take its own affirmative steps to complete a 90-day analysis of enterprise market switching. The commenters agreed that the Board should initiate a proceeding to address the FCC's presumption only if a competitive local exchange carrier (CLEC) filed a petition with evidence indicating Board review is required. The Board agreed with that analysis and issued an order on September 15, 2003, establishing an October 6, 2003, deadline for filing any such petitions.

No CLEC filed a petition to rebut the FCC's presumption of "no impairment" for enterprise switching. However, on October 6, 2003, OpenCom, Inc. (OpenCom), filed a petition to rebut the FCC's national presumption regarding line sharing as set forth in the Triennial Review Order (TRO). Line sharing occurs when a competing carrier provides digital subscriber line (DSL) service over the high frequency portion of the same line the incumbent local exchange carrier uses to provide voice services

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, "Report and Order on Remand and Further Notice of Proposed Rulemaking," FCC 03-36 (rel. Aug. 21, 2003) (Triennial Review Order or TRO).

(using the low frequency portion of the line). The TRO eliminated line sharing, subject to grandfathering provisions and a three-year transition plan. A competitor currently relying on line sharing to provide DSL service to its customers will need to purchase a stand-alone loop or enter into a line splitting arrangement with another CLEC in accordance with the three-year transition plan described in the FCC's TRO. OpenCom indicates that those provisions of the FCC's transition period result in entry barriers that are too costly for OpenCom to overcome in the geographic area it serves.

On October 15, 2003, Qwest Corporation (Qwest) filed a response stating that OpenCom's petition is beyond the scope of this docket and is otherwise improper. Qwest states that the purpose of the Board's September 15, 2003, order was to initiate a 90-day proceeding to review impairment in enterprise switching only if a petition were filed by a CLEC. Qwest contends OpenCom's petition is contrary to the Board's order since it did not rebut the FCC's "no impairment" finding for enterprise switching, instead asking the Board to review the FCC's presumption regarding line sharing.

Qwest also alleges that OpenCom's petition is contrary to the TRO. The FCC specifically delegated to the states responsibility to conduct impairment analyses in certain limited areas, including enterprise and mass market switching, high capacity loops, and high capacity transport. Line sharing is not included on this list. Additionally, Qwest points out that the TRO only delegated to the states the authority "to undertake the analyses set forth in this Order."²

² TRO, at paragraph 190.

Qwest also suggests that the Board is preempted by federal law from rebutting the TRO's elimination of line sharing as a UNE. Because the Telecommunications Act of 1996 assigned the FCC authority to implement 47 U.S.C. § 251(d)(2), states arguably do not have plenary authority under federal law to create, modify, or eliminate unbundling obligations. Qwest argues that as a result of this absence of "plenary authority," the FCC expressly stated, "[W]e limit the states' delegated authority to the specific areas and network elements identified in this order."

On October 24, 2003, OpenCom filed a reply to Qwest's response stating that OpenCom and its customers are adversely affected by the TRO. OpenCom notes that Senator Grassley joined in a letter to the FCC expressing a similar concern over the line sharing issue. OpenCom also argues that although Qwest casts OpenCom's petition as being beyond the scope of this proceeding, it broadly stated its request for "such relief as the Board might find just and protective of the public interest in the deployment of broadband services," as is suited to the task of implementing a sweeping federal ruling.

OpenCom contends the FCC has acknowledged that the Board is not preempted from regulating this area as a matter of law. Instead, the FCC views the Board as having the authority to take unbundling actions that are "consistent with the requirements of 47 U.S.C. § 251 and do not 'substantially prevent' the implementation of the federal regulatory scheme."³ As regards to line sharing, the FCC specifically states:

³ TRO, at paragraphs 192-193.

[I]f a decision taken pursuant to state law after this Order becomes effective were to require line sharing obligations, any party that believes such decision is inconsistent with the limits of section 251(d)(3)(B) and (C) may seek a declaratory ruling from this Commission.⁴

The Board agrees with Qwest's contention that the OpenCom petition is beyond the scope of this proceeding. The TRO contemplates a 90-day proceeding for addressing only the issue of local circuit switching impairment in the enterprise market; the time restriction makes it imperative that the issues be appropriately limited. The Board will deny OpenCom's petition.

As a final matter, the Board's September 15, 2003, order required Qwest to file, by October 6, 2003, a revised Statement of Generally Available Terms and Conditions (SGAT) incorporating the changes resulting from the FCC's presumptive finding. The required filing was meant to ensure that SGAT revisions were identified prior to the start of the 90-day proceedings. The date for the revised SGAT filing was based on comments filed by Qwest on June 30, 2003, prior to the issuance of the TRO.

On October 3, 2003, Qwest filed a motion to postpone the filing of the revised SGAT. Qwest noted that the TRO contemplated a second 90-day period commencing after the conclusion of the initial 90-day proceeding for the approval of changes to interconnection agreements.⁵ Qwest proposed filing the revised SGAT 30 days after the date of a Board order declining to file a petition with the FCC rebutting the "no impairment" presumption. Thereafter, the parties and the Board

⁴ TRO, at paragraph 264.

⁵ TRO, Appendix B – Final Rules, Section 51.319(d)(3)(ii)(A), p. 25.

would have 60 days to consider the revisions before the SGAT's effective date.

There were no objections filed in response to Qwest's motion to postpone the SGAT filing, and the Board will grant the motion.

IT IS THEREFORE ORDERED:

1. The portion of this docket that was intended to be used to gather evidence and make a determination regarding the presumption made by the FCC that no impairment exists in enterprise switching is closed. No competitive local exchange carrier requested the Board make such a determination.

2. The Board denies the request by OpenCom to rebut the FCC's national presumption regarding line sharing for reasons specified in the body of this order.

3. The Board grants Qwest's motion to postpone the filing of the revised SGAT until 30 days after the date of this order.

UTILITIES BOARD

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Sharon Mayer
Executive Secretary, Assistant to

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 29th day of December, 2003.